Sarjit Singh a/l Kesar Singh v Harjindar Kaur a/p Koondan Singh

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)–1933–11 OF 2015
HAMID SULTAN, AHMADI ASNAWI AND MARY LIM JJCA
7 NOVEMBER 2016

Civil Procedure — Probate — Contentious probate proceedings — Whether party challenging validity of will to comply with mandatory provisions of O 72 rr 2(2) and 13 of the Rules of Court 2012 — Whether failure to plead matters specified under O 72 r 13(3) meant court could not make a finding on such unpleaded issues — Whether failure to plead matters under O 72 r 13 affected shifting of initial evidential burden of proof between disputing parties

A police officer ('the deceased') had made his brother ('the appellant') the executor of his will in 2008 under which he bequeathed his house to the appellant's two sons, left the gratuity from his employment to be shared between his mother and his wife ('the respondent') and left the residue of his estate to the respondent absolutely. In an earlier will, made in the year 2003, the deceased had left his house to the respondent. In a probate action filed in the High Court, the respondent alleged that the deceased's signature in the 2008 will was forged. She, however, did not adduce any evidence to prove that allegation; neither did her action comply with various mandatory conditions that were required to be satisfied under O 72 of the Rules of Court 2012 ('the ROC'). The High Court found for the respondent and denied probate to the appellant holding, inter alia, that: (a) the sole issue before the court was whether the 2008 will was valid; (b) the respondent's pleaded case was that the deceased's signature in the will had been forged but that issue could not be determined because she had not adduced any evidence to prove that allegation; (c) there was non-compliance with ss 5 and 15 of the Wills Act 1959 in relation to, respectively, the execution of the will and the alteration to an identity card number in the will; (d) suspicious circumstances relating to the execution of the will had not been dispelled; and (e) there was no evidence the contents of the will had been explained to the deceased. In the instant appeal to set aside the order of the High Court, the appellant argued that, contrary to the requirement in O 72 r 13(1) of the ROC, the respondent in her statement of claim never disputed his interest as executor of the will nor did she dispute the interests of his children as beneficiaries under the will. He also said the respondent's failure to plead the mandatory matters which were required to be pleaded under O 72 r 13(3) of the ROC to challenge the will was fatal to her case.

Held, allowing the appeal:

(1) The trial judge failed to appreciate the importance of the pleading rules relating to probate matters. The application of the law to the facts had also resulted in the integrity of the decision-making process to be compromised thereby warranting the judgment to be set aside *in limine* (see para 2).

(2) It was a strict requirement under O 72 r 2(2) of the ROC that the writ in the probate action must be endorsed with a statement of the nature of the interest of the plaintiff and of the defendant in the estate of the deceased to which the action related. This requirement was not complied with. The endorsement became relevant when there was an allegation that the requirements under O 72 r 13 were not satisfied to enable the plaintiff to succeed. If the mandatory particulars stated therein were not pleaded, the court could not make a finding on unpleaded issues (see paras 10–11).

(3) Order 72 r 13 required the plaintiff (the respondent) to plead the elements relating to testamentary capacity and other challenges to the will. Once the challenge was made to the will, the initial burden shifted to the defendant. If there was no challenge, then it followed that the burden would not shift. In such instance, the threshold for the defendant to satisfy the initial burden might not arise at all and/or the threshold might be low as the testamentary capacity, etc was not challenged. It was not the respondent's pleaded case that (a) the will was not duly executed (b) at the time of execution of the will, the testator was not of sound mind, memory and understanding and (c) the execution of the will was obtained by undue influence or fraud. The respondent's pleaded case was forgery but as the trial judge found that that issue was not pursued with, the nett effect of such a finding, as per the pleadings, would be to dismiss the respondent's case. The trial judge stated that the sole issue before the court was whether the 2008 will was valid as the testator's last will and testament. Again, the statement of claim showed that this was not the respondent's pleaded case. On that reason alone, the appeal had to be allowed *in limine* as it was trite the court must not deal with issues which were not pleaded (see paras 5 & 13–16).

(4) The trial judge's finding that the will was not executed as per the requirements of ss 5 and 15 of the Wills Act 1959 was not the respondent's pleaded case. Based on the evidence and submissions, this court took the view that both those sections had been satisfied taking into consideration that that was not the clearly pleaded case of the respondent nor the issues to be tried (see para 20).

(5) The court was satisfied the appellant had discharged the initial burden that the deceased had testamentary capacity and that he did execute the 2008 will. There was overwhelming evidence on these issues. The

appellant's main witness, DW5 (the solicitor who prepared the will), was not challenged in any material form for the trial judge to conclude that the initial burden was not satisfied by the appellant. It was not disputed that the deceased at the time of making the 2008 will was gainfully employed as a police officer to negate any issue of testamentary capacity or undue influence. The trial judge failed to deal with the probative force of DW5 with regard to the due execution of the will as well as the fact that the deceased was a police officer at the time of making of the will (see paras 4 & 20).

[Bahasa Malaysia summary

Seorang pegawai polis ('si mati') telah melantik abangnya ('perayu') sebagai pelaksana wasiat pada tahun 2008 di mana dia mewariskan rumahnya kepada dua anak lelaki perayu, meninggalkan ganjaran daripada pekerjaannya untuk dikongsi bersama antara ibu dan isterinya ('responden') dan meninggalkan baki harta pusakanya kepada responden sepenuhnya. Dalam wasiat terdahulu, yang dibuat pada tahun 2003, si mati telah meninggalkan rumahnya kepada responden. Dalam suatu tindakan probet yang difailkan di Mahkamah Tinggi, responden mendakwa tandatangan si mati dalam wasiat 2008 telah dipalsukan. Dia, bagaimanapun, tidak mengemukakan apa-apa keterangan untuk membuktikan dakwaan tersebut; tindakannya juga tidak mematuhi pelbagai syarat wajib yang diperlukan untuk dipenuhi di bawah A 72 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Mahkamah Tinggi memihak kepada responden dan menafikan probet pegangan perayu, antara lain, bahawa: (a) isu tunggal di hadapan mahkamah adalah sama ada wasiat 2008 adalah sah; (b) kes yang diplid responden adalah bahawa tandatangan si mati dalam wasiat telah dipalsukan tetapi isu tersebut tidak dapat ditentukan kerana dia tidak mengemukakan apa-apa keterangan untuk membuktikan dakwaan tersebut; (c) terdapat ketidakpatuhan ss 5 dan 15 Akta Wasiat 1959 berhubung dengan, pelaksanaan wasiat dan pengubahan kepada nombor kad pengenalan dalam wasiat; (d) keadaan mencurigakan berhubungan dengan pelaksanaan wasiat belum diketepikan; dan (e) tiada bukti bahawa kandungan wasiat telah dijelaskan kepada si mati. Dalam rayuan untuk mengetepikan perintah Mahkamah Tinggi, perayu berhujah bahawa, bertentangan dengan keperluan dalam A 72 k 13(1) KKM, responden dalam pernyataan tuntutannya tidak pernah mempertikaikan haknya sebagai wasi kepada wasiat dan tidak juga dia mempertikaikan hak anak-anaknya sebagai benefisiari di bawah wasiat. Dia juga menyatakan bahawa kegagalan responden untuk memplid perkara-perkara wajib yang dikehendaki untuk diplid di bawah A 72 k 13(3) KKM untuk mencabar wasiat tersebut adalah menjejaskan kesnya.

Diputuskan, membenarkan rayuan:

(1) Hakim perbicaraan gagal menghargai kepentingan peraturan pliding berhubung perkara probet. Pemakaian undang-undang kepada

fakta-fakta juga telah menyebabkan integriti proses membuat keputusan telah dikompromi dengan itu mewajarkan penghakiman diketepikan *in limine* (lihat perenggan 2). A

(2) Adalah satu keperluan ketat di bawah A 72 k 2(2) KKM bahawa writ dalam tindakan probet hendaklah disahkan dengan suatu pernyataan mengenai sifat kepentingan plaintif dan defendan dalam harta pusaka si mati di mana tindakan tersebut berkait. Keperluan ini tidak dipenuhi. Pengendorsan ini menjadi relevan apabila terdapat dakwaan bahawa keperluan di bawah A 72 k 13 tidak dipenuhi untuk membolehkan plaintif berjaya. Jika butir-butir wajib yang dinyatakan di dalamnya tidak diplid, mahkamah tidak boleh membuat dapatan mengenai isu-isu yang tidak diplid (lihat perenggan 10-11). B C

(3) Aturan 72 k 13 memerlukan plaintif (responden) untuk memplid elemen berkaitan dengan keupayaan wasiat dan cabaran lain kepada wasiat. Setelah cabaran itu dibuat kepada wasiat, beban awal beralih kepada defendan. Jika tiada cabaran, maka berikutan itu beban tidak akan teralih. Dalam hal ini, had bagi defendan untuk memenuhi beban awal mungkin tidak timbul sama sekali dan/atau had tersebut mungkin serendah kapasiti wasiat tersebut dan lain-lain tidak dicabar. Bukanlah kes yang diplid responden bahawa (a) wasiat itu tidak dilaksanakan dengan sewajarnya (b) pada masa pelaksanaan wasiat, pewasiat tidak sempurna akal, ingatan dan kefahaman dan (c) pelaksanaan wasiat adalah diperolehi oleh pengaruh tidak wajar atau penipuan. Kes yang diplid responden adalah pemalsuan tetapi memandangkan hakim perbicaraan mendapati bahawa isu tersebut tidak diteruskan, kesan bersih dapatan tersebut, seperti dalam pliding, adalah untuk menolak kes responden. Hakim perbicaraan menyatakan bahawa isu tunggal di hadapan mahkamah ialah sama ada wasiat 2008 adalah sah sebagai wasiat pewasiat yang terakhir. Sekali lagi, pernyataan tuntutan menunjukkan bahawa ini bukanlah kes yang diplid responden. Berdasarkan alasan itu sahaja, rayuan perlu dibenarkan *in limine* memandangkan adalah terpakai bahawa mahkamah tidak perlu menangani isu-isu yang tidak diplid (lihat perenggan 5 & 13–16). D E F G

(4) Dapatan hakim perbicaraan bahawa wasiat tersebut tidak dilaksanakan mengikut keperluan ss 5 dan 15 Akta Wasiat 1959 bukanlah kes responden yang diplidkan. Berdasarkan keterangan dan hujahan, mahkamah ini berpendapat bahawa kedua-dua seksyen tersebut telah dipenuhi dengan mengambil kira bahawa itu dengan jelas bukanlah kes yang diplidkan responden mahupun isu yang akan dibicarakan (lihat perenggan 20). H I

(5) Mahkamah berpuas hati perayu telah melepaskan beban awal bahawa si mati mempunyai kapasiti wasiat dan bahawa dia telah melaksanakan wasiat 2008. Terdapat bukti kukuh mengenai isu-isu ini. Saksi utama

perayu, DW5 (peguamcara yang menyediakan wasiat), tidak dicabar dalam mana-mana bentuk material untuk hakim perbicaraan putuskan bahawa beban awal tidak dipenuhi oleh perayu. Tidak dipertikaikan bahawa si mati pada masa penulisan wasiat pada tahun 2008 mendapat pekerjaan sebagai pegawai polis untuk menafikan sebarang isu kapasiti wasiat atau pengaruh yang tidak wajar. Hakim perbicaraan gagal untuk menangani desakan probatif DW5 berhubung dengan pelaksanaan wasiat tersebut, begitu juga dengan fakta bahawa si mati adalah seorang pegawai polis pada masa penulisan wasiat (lihat perenggan 4 & 20).]

Notes

For a case on contentious probate proceedings, see 2(4) *Mallal's Digest* (5th Ed, 2015) para 7747.

Cases referred to

Barry v Butlin (1838) 2 Moo PCC 480 (refd)
Brown v Dunn (1893) 6 R 67, HL (refd)
Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy [2016] 5 MLJ 590; [2016] 8 CLJ 293, FC (refd)
Heritage Grand Vacation Club Bhd v Pacific Fantasy Vacation Sdn Bhd [2016] 4 MLJ 389; [2016] 7 CLJ 679, CA (refd)
Ong Cheng Guan (suing on his behalf and on the behalf of the beneficiaries to the late Ong Eng Bee) & Anor v Ong Eng Hock & Anor (Civil Appeal No J-02–2521–10 of 2012) (unreported), CA (refd)
Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61; [1997] 1 MLRA 1, FC (refd)
Small Medium Enterprise Development Bank Malaysia (formerly known as Bank Perusahaan Kecil dan Sederhana Malaysia Bhd) v Lim Woon Katt [2016] 5 MLJ 220, CA (refd)
Tok Siew Ling & Anor v Low Chee Choy [2014] 9 MLJ 787, HC (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152; [1990] 1 CLJ 1113; [1990] 1 CLJ Rep 330, SC (refd)

Legislation referred to

Rules of Court 2012 O 72, O 72 rr 2(2), 13
Wills Act 1959 ss 5, 15

Amarjeet Singh (Avtar Singh with him) (Zubeda & Amarjeet) for the appellant.
Saravanan (Ellen Cheran with him) (Saravanan & Nasriq) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant/defendant appealed to set aside the order of the High Court which had revoked the probate granted to the appellant came up for hearing on 24 May 2016. Upon hearing the submissions of the parties, we

allowed the appeal. My learned brother Ahmad bin Hj Asnawi JCA and sister Mary Lim Thiam Suan JCA have read the judgment and approved the same.

PRELIMINARIES AND JURISPRUDENCE

[2] In the instant case, the learned trial judge had failed to appreciate the importance of the pleading rules related to probate matters as well as the rule in *Brown v Dunn* (1893) 6 R 67 (HL) (see *Small Medium Enterprise Development Bank Malaysia (formerly known as Bank Perusahaan Kecil dan Sederhana Malaysia Bhd) v Lim Woon Katt* [2016] 5 MLJ 220). Further, the application of the law to the facts had resulted in the integrity of the decision making process to be compromised, thereby warranting this court to set aside the judgment *in limine*. Upon invitation by the learned counsel, we took the liberty to go through the evidence and notes of proceedings by way of rehearing to reach a decision based on rule of law.

[3] The learned judge had specifically noted that the pleaded case was based on alleged forgery of the deceased's signature and had observed that the plaintiff did not pursue the forgery issue. That part of the judgment reads as follows:

> The plaintiff has pleaded alleged forgery of the deceased's signature on the will. However, since this issue was not pursued and no evidence was adduced by the plaintiff by way of evidence of analysis of signature of deceased, I make no determination on this issue.

However, the learned judge went on to make findings on issues that were not pleaded to allow the plaintiff's action.

[4] It is not in dispute that the deceased at the time of making the 2008 will was gainfully employed as a police officer to negate any issue of testamentary capacity or undue influence. The due execution of the will was supported by the solicitor who prepared the will ('DW5') and his evidence was not challenged. The learned trial judge had failed to deal with the probative force of DW5 as well as the fact that the deceased was a police officer at the time of making the will.

[5] The learned trial judge had failed to appreciate the importance of O 72 r 13 which requires the plaintiff to plead the elements relating to what we often used to term as testamentary capacity and other challenges to the will. Once, when the challenge is made to the will the initial burden shifts to the defendant. If there is no challenge then it will follow that the burden will not shift to the defendant. It may be different if a party is propounding the will in the first instance. This distinction must be kept in mind. In *Ong Cheng Guan (suing on his behalf and on the behalf of the beneficiaries to the late Ong Eng Bee) & Anor v Ong Eng Hock & Anor* Civil Appeal No J-02–2521–10 of 2012 (unreported),

Hamid Sultan bin Abu Backer JCA sitting with Umi Kalthum bt Abdul Majid JCA and Abdul Rahman bin Sebli JCA had this to say:

> [5] When a person challenges the will, the court as a matter of practice will first invite the defendants who are the propounder of the will to prove:
>
> (i) There was due execution of the will;
>
> (ii) Dispel any suspicious circumstances surrounding the making of the will.
>
> Once the court is satisfied with the evidence adduced to all the related issues, then only it becomes incumbent upon the plaintiff who challenges the will to prove extraneous vitiating element such as undue influence, fraud or forgery, etc. Support for the proposition is found in a number of cases and to name a few are as follows:
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> (i) *Kaw Cheng Poon & Ors v Khaw Cheng Bok & Ors* [2005] 3 CLJ 753;
>
> (ii) *Lee Ing Chin & Ors v Gan Yook Chin & Anor* [2003] 2 CLJ 19 (CA); *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2004] 4 CLJ 309 (FC).

[6] Learned author *Sarkar on Evidence* (14th Ed) Vol 2 at p 1396 has this to say:

> Wills—The law has been thus stated in two well-known cases: 'These rules are two; first, that the *onus probandi* lies in every case upon the *party propounding a will and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator*. The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite suspicion of the court, and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased' [*Barry v Butlin,* (1838) 2 Moo PCC 480, 482: 46 RR 123 (relied on and explained in *Harmes v Hinkson, A* 1946 PC 156: 50CWN 895) and *Tyrrel v Painton,* 1894 PD 151: 10LT453. See *Suryanarayana v Suramma, A* 1947 PC 169; *Bai Gangabai v Bhagwan,* 29 B 530 PC: 9 CWN 769: *Gomtibai v Kanchhedilal, A* 1949 PC 272]. 'Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases, if there is no suggestion to the contrary, any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question, then at once the *onus* lies on those propounding the will to affirm positively the testamentary capacity. Moreover, if a will is only proved in common and not in solemn form, the same rule applies even though the action is to attack a probate which has been granted long ago. These propositions will be found to be settled by *Barry v Butlin (ante); Cross v Cross,* 10 LT 70: 33 LJP 49 and *Tyrrall v Painton,' (ante) — per Lord dunedin* , in *Robins v National Trust Co Ltd,* 101 IC 903 PC: 1927 AC 515; see *Jatindra v Raj Lakshmi,* 57 CLJ 8; *Kameswara v Suryaprakasa, A* 1962 AP 178]. A propounder of the will has to prove its due and valid execution and if there are any suspicious circumstances he must remove them from the mind of the court — Facts to be considered on the question of due execution of will (*Venkatachala v Thimmajamma, A* 1959 SC 443). (Emphasis added.)

[7] Though case laws have not made out the distinction in relation to Or 72 r 13 and the initial burden on the defendant, the observation above is related to common sense and pleading rules.

BRIEF FACTS

[8] The plaintiff/respondent is the wife of the deceased who in his will dated 20 December 2008 has made his brother, the defendant, as the executor of the will. The deceased who was a police officer had a house and was entitled to gratuity. The deceased had bequeathed the house to the defendant's two sons and the gratuity to be shared by the wife and the deceased's mother and the residue of his estate to his wife absolutely.

[9] Previous to the above will, the deceased by a will dated 8 September 2003 had bequeathed his house to the plaintiff and the gratuity to be divided between the plaintiff and the deceased's mother.

[10] The learned trial judge in the grounds of decision says:

(a) the sole issue before the court is whether the 2008 will is valid;

(b) since the plaintiff has challenged the validity of the will, the initial burden of proving that the deceased had testamentary capacity and that there was due execution of the will lies on the defendant, in reliance on the case of (i) *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61; [1997] 1 MLRA 1; (ii) *Barry v Butlin* (1838) 2 Moo PCC 480; (iii) *Tok Siew Ling & Anor v Low Chee Choy* [2014] 9 MLJ 787;

(c) the plaintiff's pleaded case was for forgery of the deceased's signature and since the plaintiff did not adduce evidence, no determination on the issue of forgery was made;

(d) the will was not executed as per the requirement of s 5 of the Wills Act 1959 ('the WA 1959');

(e) there was alteration to the IC number in the will and the alteration did not comply with the strict requirements of s 15 of the WA 1959;

(f) suspicious circumstance was not dispelled; and

(g) there was also no evidence that the contents of the will had been explained to the deceased.

A JURISPRUDENCE RELATING TO THE PLEADING RULES IN CONTENTIOUS PROBATE ACTION

[11] Order 72 of the Rules of Court 2012 ('the RC 2012') relates to contentious probate proceedings and is relevant to this suit. It is a strict requirement that there must be endorsement of the parties' interest. The appellant complains that this requirement was not satisfied. We perused the relevant cause papers and we agree with the appellant that the strict requirement relating to the endorsement was not complied with. Order 72 r 2(2) says:

> (2) Before a writ beginning a probate action is issued, it must be endorsed with a statement of the nature of the interest of the plaintiff and of the defendant in the estate of the deceased to which the action relates.

[12] This endorsement becomes relevant when there is an allegation that the provision of O 72 r 13 requirements are not satisfied for the plaintiff to succeed. If the mandatory particulars stated therein are not pleaded, the court cannot make a finding on unpleaded issues. Order 72 r 13 reads as follows:

> 13 Contents of pleadings (O 72, r 13)
>
> (1) Where the plaintiff in a probate action disputes the interest of a defendant he must allege in his statement of claim that he denies the interest of that defendant.
>
> (2) In a probate action in which the interest by virtue of which a party claims to be entitled to a grant of letters of administration is disputed, the party disputing that interest must show in his pleading that if the allegations made therein are proved he would be entitled to an interest in the estate.
>
> (3) Without prejudice to Order 18, rule 7, any party who pleads that at the time when a will, the subject of the action, was alleged to have been executed the testator did not know and approve of its contents must specify the nature of the case on which he intends to rely, and no allegation in support of that plea which would be relevant in support of any of the following other pleas:
>
> (a) that the will was not duly executed;
>
> (b) that at the time of the execution of the will the testator was not of sound mind, memory and understanding; and
>
> (c) that the execution of the will was obtained by undue influence or fraud, shall be made by that party unless that other plea is also pleaded.

[13] The learned counsel for the appellant on this issue says:

18. The trial judge also ignored the arguments taken against the Respondent's case for failure to comply with the requirement for specific pleadings required to be made pursuant to Order 72 of r 13(1) of the Rules of Court 2012 (see p 6 of ABA):

18.1 Under Order 72 r 13(1) it provides that a plaintiff disputing the interest of a defendant must allege in the statement of claim that the interest of the defendant is denied. The Appellant as the Defendant held the interest of being an executor appointed under the 2008 Will and yet it was not disputed in the Respondent's statement of claim. Neither did the Respondent dispute the interest of the Appellant's children named as beneficiaries under the 2008 Will.

18.2 Under Order 72 r 13(3) it provides that where a party who pleads that at the time when the will was alleged to have been executed, the testator did not know and approve the contents, that party must specify the nature of the case on which he or she intends to rely, unless the other pleas are pleaded such as that the will was not duly executed; the testator at the time of execution was not of sound mind, memory or understanding and the execution of the will was obtained by undue influence or fraud. The Respondent's statement of claim did not have the following averments that:

i. the deceased did not know and approve the contents of the 2008 Will;

ii. the deceased did not execute the 2008 Will;

iii. as at the date of execution of the 2008 Will (on 20-12-2008), the deceased was not of sound mind, memory and understanding; and

iv. the execution of the 2008 Will was obtained by undue influence or fraud.

18.3 Notwithstanding the failure on the part of the Respondent to comply with the specific rule of pleadings provided under *Order 72 r 13(1) and/or r 13(3),* the trial judge has ignored the law of pleadings and also has ignored the authority of our Federal Court in *Kanagasabai Satkurn v United Malayan Banking Corporation* [1981] 2 MLJ 23 (see pages 123-124 of ABA), that was referred to her that the court was bound to decide only on issues pleaded.

[14] To put it in another way, inter alia, it was not the pleaded case of the plaintiff:

(a) that the will was not duly executed;

(b) that at the time of the execution of the will, the testator was not of sound mind, memory and understanding; and

(c) that the execution of the will was obtained by undue influence or fraud.

[15] The jurisprudential significance of O 72 r 13 is that if there is a failure to plead the court is not obliged to make any finding on those issues. In such instance, the threshold for the defendant to satisfy the initial burden may not arise at all and/or the threshold may be low as the testamentary capacity, etc are not challenged.

[16] We have perused the statement of claim several times and we came to the conclusion that the pleaded case of the plaintiff was forgery. It was also the finding of the learned judge that the issue of forgery was not pursued by the plaintiff. The nett effect of such a finding as per the pleadings will be to dismiss the plaintiff's case.

[17] It is also interesting to note that the learned judge says that the sole issue before the court was whether the 2008 will is valid as the testator's last will and testament. Again, we perused the statement of claim and we find that this was not the pleaded case of the plaintiff. On this reason alone, the appeal must be allowed *at limine* as it is trite the court must not deal with issues which are not pleaded.

[18] Further, the agreed issues to be tried in the instant case do not also reflect as to the finding of the learned trial judge. The agreed issues to be tried read as follows:

1 Sama ada tindakan probet ini yang difailkan oleh Plaintif terhadap Defendan adalah sah dan samada tuntutan Plaintif seperti diplidkan terbukti;

2 Sama ada pcmbelaan Defendan terhadap Plaintif setakat yang diplidkan terbukti;

3 Samada Plaintif berhak untuk menuntut atau mendapatkan relif-relif yang dituntut didalam tindakan ini seperti diplidkan itu.

[19] After having perused the pleaded case of the plaintiff as well as the agreed issues to be tried, we take the view that the judgment of the court is perverse and is in breach of cardinal rules of pleadings as advocated in a number of cases. To name a few are as follows: (i) *Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy* [2016] 5 MLJ 590; [2016] 8 CLJ 293; (ii) *Heritage Grand Vacation Club Bhd v Pacific Fantasy Vacation Sdn Bhd* [2016] 4 MLJ 389; [2016] 7 CLJ 679.

[20] In *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; [1990] 1 CLJ 1113; [1990] 1 CLJ Rep 330, the Supreme Court had in strong terms held, and which still stands as a 'gold standard' in pleading rules and evidence, as follows:

It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter *involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings*. The trial of a suit should be confined to the pleas on which the parties are at variance. (Emphasis added).

[21] We are satisfied that the appellant had discharged the initial burden that the deceased had the testamentary capacity and that he did execute the 2008 will. There are overwhelming evidence on these issues. The main witnesses of the appellant in particular DW5, were not challenged in any material form for the learned trial judge to conclude that the initial burden was not satisfied by the appellant. In addition, the finding that the will was not executed as per the requirement of s 5 of the Wills Act 1959 ('the WA 1959') and there was alteration to the identity card (IC) number in the will and the alteration did not comply with the strict requirements of s 15 of the WA 1959 was not the pleaded case of the plaintiff. In our view and based on the evidence and submissions, we take the view that ss 5 and 15 of the WA 1959 were satisfied, taking into consideration that it was not the clearly pleaded case of the plaintiff as well as the issues to be tried.

[22] For reasons stated above, the appeal was allowed with no order as to costs. The deposit was refunded.

We hereby ordered so.

Appeal allowed.

Reported by Ashok Kumar